

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS**

IN RE PHARMACEUTICAL INDUSTRY
AVERAGE WHOLESAL PRICE
LITIGATION

MDL NO. 1456

CIVIL ACTION: 01-CV-12257-PBS

THIS DOCUMENT RELATES TO:
ALL ACTIONS

Hon. Patti B. Saris

FILED UNDER SEAL

**DEY'S INDIVIDUAL MEMORANDUM IN OPPOSITION TO PLAINTIFFS'
MOTION TO CERTIFY CLAIMS WITH RESPECT TO TRACK 2 DEFENDANTS**

[REDACTED VERSION]

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Defendant Dey, Inc. (“Dey”) respectfully submits this memorandum in opposition to Plaintiffs’ Motion to Certify Claims with respect to Dey. For the reasons set forth in the Track Two Defendants’ Memorandum In Opposition To Class Certification, the motion for certification should be denied. In addition, since Plaintiffs fail to propose a single class representative with standing to sue Dey, Plaintiffs’ motion should be denied as to Dey for this independent reason as well.¹

I. SUMMARY OF ARGUMENT

As to Class 1, Plaintiffs propose two individuals – Hunter G. Walters and Harold Bean – as representatives.² None of the evidence proffered by Plaintiffs demonstrates a single payment by Mr. Walters for Dey’s drugs, based on average wholesale price (“AWP”) or otherwise. Not only is there no evidence Mr. Walters paid on the basis of Dey’s AWP, the evidence in the record discloses that Mr. Walters was the beneficiary of a program, provided by his mail order pharmacy [REDACTED], which he applied for at the start of his relationship with the pharmacy. Under the terms of this program, Mr. Walters was only obligated to make flat co-payments for his medication. He was not obligated to make the 20% Medicare co-insurance payment. As the proposed Class 1 definition excludes persons who made flat co-payments, Mr. Walters may not serve as a Class 1 representative for this reason alone.

Plaintiffs ask the Court to put aside the evidence which shows that [REDACTED] [REDACTED] and assume that Mr. Walters made a single AWP-based payment for Dey’s products because he [REDACTED]

¹ Documents cited herein as “Walters ____” are annexed, in Bates number order, as Ex. A to the accompanying Declaration of Philip D. Robben, dated June 15, 2006 (“Robben Decl.”). Transcript pages cited herein as “Walters Tr. ____” are annexed as Ex. B to the Robben Decl.

² On June 8, 2006, the Court allowed Plaintiffs to add Mr. Bean as a proposed class representative. No discovery has been taken of Mr. Bean. Plaintiffs have not met their burden of establishing that Mr. Bean paid for a Dey drug based on AWP. However, Dey will serve its opposition to Mr. Bean serving as a Class 1 representative at an appropriate time after discovery as to Mr. Bean is complete.

II. ARGUMENT

A. Mr. Walters Lacks Standing to Serve As A Class Representative Against Dey

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Admittedly lacking any evidence to support their allegations, Plaintiffs have since abandoned their claim that [REDACTED]

(Haviland Decl. at 7 n.3.) However, Plaintiffs continue to press their claim that [REDACTED]

[REDACTED] In fact, the evidence shows that Mr. Walters [REDACTED] not Medicare's 20% co-insurance, under a program [REDACTED] provided by his pharmacy. This fact alone – [REDACTED] – excludes Mr. Walters from the class he seeks to represent.

The record evidence establishes that [REDACTED]

[REDACTED]
[REDACTED]
(Walters Tr. 57:22-58:11.)³ [REDACTED]

[REDACTED] (Walters Tr. at 80:15-81:17.) [REDACTED]

[REDACTED] (Walters 0012.) [REDACTED]

[REDACTED] (*Id.*)

[REDACTED] (Walters 0011.) [REDACTED]

³

At best, Plaintiffs' evidence shows that [REDACTED]

[REDACTED] As Plaintiffs concede, [REDACTED]

[REDACTED]. (Haviland Decl. ¶ 16.) Indeed, a document produced by Plaintiffs, dated [REDACTED] (Walters 0009), indicates that [REDACTED]

[REDACTED] (*See also* Walters Tr. 68:17-22.) Mr. Walters testified that [REDACTED]

[REDACTED] (Walters Tr. 125:15-127:3.)

[REDACTED]

[REDACTED]

Mr. Walters testified that

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

(Walters Tr. at 85:9-86:6.)

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

According to Mr. Walters' testimony,

[REDACTED]

[REDACTED]

(Walters Tr. 87:13-17.) Indeed, an undated letter

[REDACTED]

[REDACTED]

indicates that

[REDACTED]

[REDACTED]

(Walters 0112.) That letter also set

forth

[REDACTED]

[REDACTED]

[REDACTED]⁴

Later, effective May 1, 2004, [REDACTED]

[REDACTED] (Walters 0015.) While Mr. Walters testified that [REDACTED]

[REDACTED] (Walters Tr. 141:13-143:3.) What is clear from the record, however, is that [REDACTED]

[REDACTED]

[REDACTED].

Faced with this record, which establishes that [REDACTED]

[REDACTED] Plaintiffs resort to a host of unavailing arguments.⁵

First, Plaintiffs try to show that [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] Neither document supports Plaintiffs' motion.

Tellingly, Plaintiffs did not produce any invoices or other documents which reflect charges actually billed to, and paid by, Mr. Walters during the class period on account of Dey's [REDACTED] or [REDACTED]. (Walters Tr. 155:11-21.) [REDACTED]

[REDACTED]

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In addition to the arguments discussed below, Plaintiffs argue that [REDACTED]

[REDACTED] (Haviland Decl., at 8 n.4.) Plaintiffs argument, based on nothing more than Plaintiffs' counsel's guess about hand-written notes, should be rejected.

[REDACTED] (Walters 0001) (emphasis added). [REDACTED]

[REDACTED]

[REDACTED]⁶ [REDACTED]

This document, [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

Plaintiffs next argue that, [REDACTED]

[REDACTED] Plaintiffs' argument is flawed. There is nothing in the record to indicate that [REDACTED]

[REDACTED]

Finally, Plaintiffs try to avoid the fact of Mr. Walters' enrollment in the [REDACTED]

[REDACTED]

[REDACTED] In support of this argument, Plaintiffs point to [REDACTED] (Walters 0060.) Plaintiffs' argument stemming from [REDACTED] is based on nothing but Plaintiffs' counsel's guesswork. Neither Plaintiffs nor [REDACTED] produced an invoice which would indicate the [REDACTED]. Mr. Walters deposition testimony, on which

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[REDACTED]
(*See, e.g.*, Walters 0086; Walters 0088.) [REDACTED]
[REDACTED]

Plaintiffs rely, is silent as to [REDACTED].⁷ If anything, Mr. Walters' testimony suggests that [REDACTED] (Walters Tr. 142:14-143:3, 144:22-147:5.) Certainly, an even amount is more suggestive of a flat co-payment than it is of a fractional 20% co-insurance payment. Plaintiffs do not explain how an even dollar payment purportedly corresponds in any meaningful way with a co-insurance obligation allegedly based on fractional AWP's. Thus, it is impossible on the present record to determine whether the [REDACTED] was made on account of Mr. Walters' [REDACTED] or some other charge, and Plaintiffs' speculative argument based on the [REDACTED] should, therefore, be rejected.

B. Sheet Metal Lacks Standing To Serve As A Class Representative Against Dey

Plaintiffs propose Sheet Metal as the Class 2 representative with respect to Dey. Plaintiffs allege that Sheet Metal made reimbursements for [REDACTED] and [REDACTED] [REDACTED] Randle Aff., Exs. 2 and 3(g). However [REDACTED] and [REDACTED] are multiple-source drugs manufactured by a number of pharmaceutical companies. Since Sheet Metal's records only disclose [REDACTED] for [REDACTED] and [REDACTED] [REDACTED], it cannot prove that the drugs it allegedly paid for was manufactured by Dey.⁸ (Randle Aff., Ex. 3(g).) In addition, the [REDACTED] Plaintiffs point to, (Randle Aff., Ex. 3(g)), allegedly occurred on [REDACTED], outside the class period which ends on January 1, 2005.

⁷

[REDACTED]

⁸

See Young Rept. ¶¶ 35-36. The Randle Aff. candidly concedes that [REDACTED]

[REDACTED] Randle Aff. ¶ 6 (emphasis added).

See Proposed Order, § III.1. Since Sheet Metal cannot establish it paid for Dey's drugs, Plaintiffs cannot show that Sheet Metal has standing with respect to Dey.

C. Pipefitters Lacks Standing To Serve As A Class Representative Against Dey

Plaintiffs propose Pipefitters as their Class 3 representative. They allege – in summary fashion, only by means of a conclusory chart – that Pipefitters made AWP-based payments for [REDACTED]. (Hannaford Decl., Ex. 1.) The Pipefitters data Plaintiffs produced, however, suggests, at best, that Pipefitters made [REDACTED] for [REDACTED] during [REDACTED] and [REDACTED]. Pipefitters' records contain no indication of the source of this [REDACTED]. Rather, all that the Pipefitters data contains is the [REDACTED]. There is no evidence that the [REDACTED] Pipefitters allegedly paid for was manufactured by Dey. Since Pipefitters does not have standing with respect to Dey, it cannot serve as a representative of Class 3 against Dey.

III. CONCLUSION

For the reasons set forth above, Dey respectfully requests that this Court deny the Plaintiffs' Motion to Certify Claims with respect to Dey.

Dated: June 15, 2006

Respectfully submitted,

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By: /s Philip D. Robben

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CERTIFICATE OF SERVICE

I certify that the foregoing document was served upon the following attorneys for the Plaintiffs at the address designated by them for service of papers:

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by depositing true and correct copy of the foregoing document enclosed in a prepaid, sealed wrapper, in an official depository under the exclusive care and custody of the United States Post Office, within the State of New York, on June 15, 2006.

/s Peter Boiko

PETER BOIKO